

91-240

(1)

Supreme Court, U.S.

FILED

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NO. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

ROBERT EUGENE JACKSON,
Petitioner,

v.

The UNITED STATES of AMERICA,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

CHARLES R. SHEPPARD
KIRK DAVID LYONS
Attorneys for Petitioner
2323 McCue Road, Suite 2
Houston, Texas 77053
(713) 439-0328
Georgia 641938
Federal Admissions-No. 8472



QUESTION PRESENTED

In *Bell v. United States*, 349 U.S. 81 (1957), this Court ruled that any doubts about the reach of any statute in punishing a single cause of conduct not otherwise clarified by the statute's legislative history must be resolved in favor of lenity and against the government.

The question presented is:

Can Petitioner's sentence for possession of multiple firearms, located at the same time and place exceed the 10 year statutory maximum under 26 U.S.C. § 5871?

LIST OF PARTIES

Robert Eugene Jackson

The United States of America

Kirk David Lyons,
Attorney for Petitioner

Michael A. Jones
Assistant United States Attorney
Attorney for Respondent

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ROBERT EUGENE JACKSON,
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v.

The UNITED STATES of AMERICA,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

The Petitioner, Robert Eugene Jackson, prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above styled proceeding on February 26, 1991. The Court denied a timely filed suggestion of rehearing en banc on May 8, 1991.

OPINIONS BELOW

The United States District Court for the Western District of Missouri¹ denied Petitioner's motion under 28 U.S.C. § 2255 for correction of his sentence.

The opinion of the Court of Appeals for the Eighth Circuit was published and is reprinted in the appendix hereto, p. 1a of the appendix, *infra*.

The order of that Court denying the petition for rehearing and suggestion for rehearing en banc is reprinted in the appendix hereto, p. 3a of the appendix, *infra*.

JURISDICTION

Petitioner, Robert Eugene Jackson, was sentenced to a total term of twenty years upon his conviction by a jury on eight counts involving conspiracy to possess and possession of firearms.

Petitioner moved the District Court for a correction of his sentence under 28 U.S.C. § 2255 and such motion was denied by the Court.

Petitioner prosecuted an appeal to the Court of Appeals for the Eighth Circuit for the correction of his sentence. That Court affirmed the judgment of the trial court on February 26, 1991. It further denied Petitioner's suggestion of rehearing en banc on May 8, 1991.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under Sup. C. R. 10(a).

1. The Honorable Russell G. Clark, United States District Judge for the Western District of Missouri.

STATUTES INVOLVED

18 U.S.C. § 2

18 U.S.C. § 371

18 U.S.C. § 922(g)(2)

18 U.S.C. § 924(a)

18 U.S.C. App. 1202(a)

26 U.S.C. §5845(a)(7)

26 U.S.C. § 5861(d)

26 U.S.C. § 5871

28 U.S.C. § 2255

STATEMENT OF THE CASE

On September 15, 1987, in Christian County, within the Western District of Missouri, an eight-count criminal indictment was returned against petitioner and two co-defendants, charging various violations under the National Firearms Act. Specifically, Count One charged a general conspiracy to acquire and possess various unregistered firearms in violation of 18 U.S.C. § 371. Counts Two through Seven, inclusively, charged that on April 30, 1987, petitioner unlawfully possessed two .223 caliber machine guns, a Mossberg 12 gauge shotgun, hand grenade, a pipe bomb, and a silencer, respectively. (These various weapons were located and seized at a mobile trailer occupied by petitioner.

Count Eight charged petitioner and a codefendant with unlawful possession of several different firearms while fugitives from justice in violation of 18 U.S.C. §§ 922 (g)(2), 924(a), and § 2.

Petitioner was convicted in a criminal jury trial proceeding of all eight counts.

On June 20, 1988, the district court sentenced petitioner to various concurrent and consecutive sentences, as follows: Count I, imprisonment for five years; Counts II, III, and IV, imprisonment for 10 years to be served concurrently with each other and concurrently with the sentence imposed under Count I; on Counts V, VI, and VII, imprisonment for 10 years to be served concurrently with each other and concurrently with the sentence imposed under Count I, but consecutively to the sentences imposed on Counts II, III, and IV. On Count VIII, the district court ordered a period of five years imprisonment

to be served concurrently with the sentences imposed on Counts I through VII. In effect, petitioner was sentenced to an aggregate sentence of 20 years imprisonment.

Petitioner moved the district court to set aside, vacate, or correct the sentences imposed by that court and such motion was denied on June 12, 1990.

Petitioner then prosecuted an appeal to the United States Court of Appeals for the Eighth Circuit and such court affirmed the denial of petitioner's motion to correct on February 26, 1991.

Petitioner filed a suggestion for rehearing en banc with the Court of Appeals for the Eighth Circuit and the same was denied by that court on May 8, 1991 and this Petition for Writ of Certiorari follows.

REASON FOR GRANTING THE WRIT

PETITIONER'S 20 YEAR SENTENCE FOR POSSESSION OF MULTIPLE FIREARMS (LOCATED AT THE SAME TIME AND PLACE) EXCEEDED THE STATUTORY MAXIMUM UNDER 26 U.S.C. § 5871.

§ 5861, part of the National Firearms Act, prohibits *inter alia*, the manufacture, receipt or possession, and transfer of a firearm which is unregistered. Each unregistered firearm may support a separate unit of prosecution under the statute, and the same firearm may generate violations of more than one provision of § 5861. *United States v. Nichols*, 731 F.2d 545, 546-47 (8th Cir.), *cert. denied*, 469 U.S. 1085 (1984). When violations of § 5861 relate to one course of conduct, the sentence cannot not exceed the ten-year maximum in § 5871. *Id.* at 547.

Petitioner argued in his appeal to the Eighth Circuit that his sentence should be corrected on the ground that the sentences imposed on Counts II through VII exceeded the ten-year statutory maximum under 26 U.S.C. § 5871 for a single course of conduct, i.e., the simultaneous possession of unregistered firearms. The district court denied Petitioner's motion to correct, finding that each unregistered firearm was a separate unit of prosecution even though simultaneously possessed. The Eighth Circuit affirmed the district court's finding.

Petitioner maintains that his conduct as a whole constituted a single course of conduct, a single criminal episode, for the purposes of punishment under § 5871. *Nichols, supra*, which involved the possession of two unregistered firearms and the unauthorized transfer of both, permitted consecutive sentences in Petitioner's situation.

However, *Nichols* is factually and legally distinguishable from Petitioner's case. In Petitioner's case there was no transfer or sale of any firearm. Petitioner was merely in possession of the unregistered firearms. Cf. *Nichols, supra*; *United States v. Killian*, 504 F.2d 1153 (8th Cir.) (making illegal firearms and transferring them multiple offenses which allow consecutive eight-year sentences).

A. As A Whole, Petitioner's Conduct Constituted A Single Course Of Conduct Subject To A Maximum Prescribed Punishment.

Petitioner concedes that each unregistered firearm creates a separate unit of prosecution pursuant to 26 U.S.C. § 5861(d). However, the total permissible sen-

tence is 10 years imprisonment if the firearms are merely simultaneously possessed.

Even the Eighth Circuit, the court that heard Petitioners appeal, has previously held that consecutive sentences in Petitioner's circumstances may not exceed 10 years:

Each silencer is a separate firearm under the statute and, thus, is a separate unit of prosecution, (citing *Nichols, supra*). A defendant may not be sentenced in excess of 10 years, however, if his actions as a whole constitute a single course of conduct prohibited by the statute. *United States v. Bradley*, 869 F.2d 417 (8th Cir.).

It is well-established that under 18 U.S.C. App. 1202(a) the simultaneous, undifferentiated possession of multiple firearms constitutes only one offense for punishment. *United States v. Hodges*, 628 F.2d 350, 351 (5th Cir.) (collecting cases). Indeed, the simultaneous possession constitutes only one offense under § 922(g). *United States v. Grinkiewicz*, 873 F.2d 253, 255 (11th Cir. 1989). The general rule has been that only one offense is charged regardless of the number of firearms involved, absent a showing that the firearms were stored or acquired at different times or places. *United States v. Bonavia*, 927 F.2d 565 (11th Cir. 1991) at 568, (citing *United States v. Bullock*, 615 F.2d 1082, 1084 (5th Cir. 1980)).

B. While Each Firearm Jointly Possessed May Be Considered A Separate Unit For Prosecution, Cumulative Sentences Exceeding 10 Years Is Not Authorized By Statute Or Legislative History.

To the extent that *Nichols* interprets § 5861(d) as allowing cumulative punishments in excess of 10 years

for multiple firearms, this interpretation may be considered *dicta*. Nichols received three consecutive five-year terms, although he received five years over the statutory ceiling. He received a total of 10 years for possession on the two firearms, hence a sentence within the statutory maximum (he received five years for the transfer/sale of one of the two firearms).

Viewing his conduct as a whole, Nichols has committed two distinct courses of conduct violative of two separate statutory provisions, 26 U.S.C. § 5845(a)(7) and 26 U.S.C. § 5861(d). In contrast, Petitioner's actions as a whole establish but one course of conduct. *Cf. United States v. Calhoun*, 510 F.2d 861 (7th Cir. 1975) (absent showing that two firearms were stored or acquired at different times or places, there is only one offense, not two, citing *McFarland v. Pickett*, 469 F.2d 1277 (7th Cir.)).

Moreover, in *Kilian*, *supra*, this court recognized that the unlawful transfer/sale of a firearm created a unique danger to society, distinct from the unlawful making of a firearm. Consecutive sentences exceeding 10 years in *Kilian* were upheld.

Petitioner urges that neither § 5871 nor its legislative history support an intent to pyramid the penalties in Petitioner's circumstances.

Under § 5861(d), it is unlawful for any person to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record. (*Nichols*, *supra*, 731 F.2d at 546). (Emphasis added). § 5871 prescribes punishment of 10 years for

anyone who "violates or fails to comply with *any provision* of the chapter . . ." (Emphasis added).

Read in conjunction with § 5861(d), § 5871 appears to prohibit cumulative punishment above 10 years for separate convictions. However, the term "any provision" contained in § 5871 may appear ambiguous. *See United States v. Kinsley*, 518 F.2d 665 (8th Cir.). In considering this possible ambiguity in the statute, the Eighth Circuit opined in *Kinsley* that:

[I]n many cases in which the courts have found a *Bell*-type ambiguity, the object of the offense had be prefaced by the word "any". Seemingly this is because the word "any" may be said to fully encompass, i.e. not necessarily exclude any part of, plural activity, and thus fails to unambiguously define the unit of prosecution in singular terms. *Id.* 518 F.2d at 667.

If there is any ambiguity in § 5871, as there appears to be, the legislative history of the statute must be consulted to clarify Congress' true intentions in prescribing punishment. A review of the legislative history of the statutes at issue express no intention to allow cumulative punishments in excess of 10 years. *See United States v. Clements*, 471 F.2d 1253 (9th Cir.).

C. The Rule Of Lenity Is Applicable To § 5871.

Any doubts about the reach of § 5871 in punishing a single course of conduct not otherwise clarified by the statute's legislative history must be resolved in favor of lenity and against the government. *See Bell v. United States*, 349 U.S. 81 (1957). It is significant that § 5861 (d) utilizes clear language in prescribing multiple prose-

cutions for each firearm, while § 5871 may not so clearly prescribe the permissible punishment.

Petitioner submits that, if Congress had truly intended to provide punishment in excess of 10 years for the simultaneous possession of different firearms, or for similar offenses, Congress would have stated this intent in language just as clear as it used in prescribing separate convictions under § 5861(d).

CONCLUSION

For all the reasons set forth above, this Court should grant this petition for a writ of certiorari, review the decision of the Court of Appeals for the Eleventh Circuit, reverse that decision and order that the sentence of petitioner be corrected to ten years.

This the 7th day of August, 1991.

CHARLES R. SHEPPARD
KIRK DAVID LYONS
Attorneys for Petitioner
2323 McCue Road, Suite 2
Houston, Texas 77053
(713) 439-0328 Office
(713) 439-1562 Facsimile

By: _____

KIRK DAVID LYONS
Georgia 641938
Federal Admissions No. 8472

1a

APPENDIX

**IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION**

NO. 90-3103-CV-S

**ROBERT EUGENE JACKSON,
Movant,**

v.

**UNITED STATES OF AMERICA,
Respondent.**

Filed June 12, 1990

O R D E R

On April 13, 1988 a jury returned verdicts of guilty against Robert Eugene Jackson on all eight counts of an indictment. Count I charged a criminal conspiracy to possess unregistered weapons in violation of 18 U.S.C. § 371; Counts II through VII charged defendant with possession of unregistered firearms in violation of 26 U.S.C. § 5861(d) and 5871; Count II involved a machine gun; Count III involved a different machine gun; Count IV involved a sawed off shotgun; Count V involved hand grenades; Count VI involved a pipe bomb; Count VII involved a silencer; and Count VIII charged defendant with possession of firearms and ammunition as a fugitive from justice. On June 21, 1988 the Court imposed the following sentences: Count I imprisonment for five years; counts II, III and IV imprisonment for ten years on each count to be concurrent with each other and concurrent

to the sentence on Count I; on Counts V, VI and VII imprisonment for ten years on each count to run concurrently with each other and concurrent to the sentence imposed on Count I but consecutive to the sentence imposed on Counts II, III and IV and on Count VIII the defendant was sentenced to imprisonment for a period of five years to be concurrent with the sentences imposed on Counts I through VII. In summary defendant was sentenced to the custody of the Attorney General for a period of twenty years.

On March 8, 1990 defendant filed a motion pursuant to 28 U.S.C. § 2255 to vacate, set aside or correct the sentences. He alleges that the Court lacked jurisdiction over him as he was maintaining a lawful "unorganized militia", the Court erred in preventing him from submitting this jurisdictional issue to the jury and his sentence exceeded the legal maximum in that his possession of weapons charged in Counts II through VII was at the same time and the sentence on each count should have been concurrent with each other.

Defendant's motion will be denied as frivolous. In *United States v. Miller*, 307 U.S. 174 (1939) the Court rejected defendant's jurisdictional argument. In that case the defendants were charged with transporting an unregistered sawed off shotgun in interstate commerce. The court held that the National Firearms Act was not in violation of the Second Amendment nor an unconstitutional invasion of the powers reserved to the states. Defendant's offense occurred in the Western District of Missouri, he was arrested in the district and was indicted by a duly convened grand jury. Defendant's conduct was in violation of the laws of the United States and under

18 U.S.C. § 3231 this Court had jurisdiction. His claim that this Court lacked jurisdiction based upon his removal of any contractual nexus with the United States government is frivolous. *United States v. Schmit*, 784 F.2d 880 (8th Cir. 1986).

Under 26 U.S.C. § 5861(d) each unregistered firearm is a separate unit of prosecution and this is true even though defendant possessed several unregistered firearms at the same time. The sentence imposed by the Court was permissible and was not more than the legal maximum. *United States v. Nichols*, 731 F.2d 545 (8th Cir. 1984).

It is

ORDERED that defendant's motion to set aside, vacate or correct the sentences imposed by this Court on June 21, 1988 is denied.

/s/ RUSSELL G. CLARK
Russell G. Clark, Judge
United States District Court

Date: June 12, 1990

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 90-2233

ROBERT EUGENE JACKSON,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court
for the Western District of Missouri.

[PUBLISHED]

Submitted: February 1, 1991

Filed: February 26, 1991

Before JOHN R. GIBSON, Circuit Judge, BRIGHT,
Senior Circuit Judge, and FAGG, Circuit Judge.

PER CURIAM.

Robert Eugene Jackson was sentenced to a total term of twenty years upon his convictions by a jury on eight counts involving conspiracy to possess and possession of firearms. Jackson appeals the district court's¹ denial of his motion under 28 U.S.C. § 2255 for correction of his sentence on the ground that the total term exceed the statutory maximum under 26 U.S.C. § 5871. We affirm.

1. The Honorable Russell G. Clark, United States District Judge for the Western District of Missouri.

Jackson was indicted on eight counts of a nine-count indictment. Count one charged Jackson with conspiring to acquire and possess firearms between March 31 and April 30, 1987; counts two through seven charged Jackson with possessing specific unregistered firearms on April 30, 1987, in violation of 26 U.S.C. §§ 5861(d) and 5871; and count eight charged him with possessing firearms (different from those in counts two through seven) on April 30, 1987, while a fugitive from justice.

A jury convicted Jackson on all eight counts. The district court sentenced him to concurrent ten-year sentences on counts five through four; concurrent ten-year sentences on counts five through seven to run consecutively with the terms imposed on counts two through four; five years on count one to run concurrently with the terms imposed on counts two through seven; and five years on count eight to run concurrently with all other terms.

Jackson filed the instant action for correction of his sentence on the ground that the sentences imposed on counts two through seven exceeded the ten-year statutory maximum under 26 U.S.C. § 5871 for a single course of conduct, i.e., the simultaneous possession of unregistered firearms.² The district court denied the motion, finding that each unregistered firearm was a separate unit of prosecution even though simultaneously possessed. Jackson asserts his argument on appeal.

Section 5861, part of the National Firearms Act, prohibits, *inter alia*, the manufacture, receipt or possession, and transfer of "a firearm" which is unregistered. Each

2. The rejection of Jackson's other claim raised below is not challenged on appeal.

unregistered firearm supports a separate unit of prosecution under the statute, and the same firearm may generate violations of more than one provision of section 5861. *United States v. Nichols*, 731 F.2d 545, 546-47 (8th Cir.), *cert. denied*, 469 U.S. 1085 (1984). When violations of section 5861 relate to one course of conduct, the sentence cannot exceed the ten-year maximum in section 5871. *Id.* at 547.

Here, the possession of each unregistered firearm supported a separate unit of prosecution and a separate course of conduct. *See id.* Thus, each count of possession of an unregistered firearm was subject to the ten-year maximum under section 5871. Jackson's reliance on *Bell v. United States*, 349 U.S. 81 (1955) (Mann Act ambiguous on unit of prosecution; doubt resolved in favor of defendant), is misplaced because the statute here refers explicitly to "a firearm."

Accordingly, we affirm the district court's order.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 90-2233WM

ROBERT EUGENE JACKSON
Appellee,

v.

UNITED STATES OF AMERICA,
Appellant.

Order Denying Petition For Rehearing
and Suggestion For Rehearing En Banc

Suggestion for rehearing en banc, filed by the appellant has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

May 8, 1991

Order Entered at the Direction of the Court:

/s/ MICHAEL E. GANS

Clerk, U.S. Court of Appeals, Eighth Circuit.